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In the

Supreme Court of the United States

OCTOBER TERM 1940

NO. 12

UNITED STATES OF AMERICA - - - Petitioner

v.

APPALACHIAN ELECTRIC POWER COMPANY - - - - - - - - - - Respondent

BRIEF ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, AS AMICUS CURIAE

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MAY IT PLEASE THE COURT:

Notwithstanding we have joined in the brief filed on behalf of the State of North Carolina, we have decided to file this additional brief on behalf of Kentucky to emphasize a point we deem to be of much importance.

We will not undertake to restate this case—that has been done in a manner so complete by General McMullan of North Carolina that an additional statement by us would constitute an unnecessary repetition. As to the factual aspects of the case, all the facts were before the Federal

District Court and its decision was adverse to the contention of petitioners; and the Circuit Court of Appeals, Fourth Circuit, has reviewed the evidence before the lower court and by a majority opinion sustains the findings of that court. Therefore we are assuming that New River is not a navigable stream in fact, and that the construction of the project proposed will not affect adversely the navigability of the Kanawha River into which New River flows.

INTEREST OF KENTUCKY

The purpose of this brief is to protest against the assumption by the Federal Power Commission of jurisdiction over non-navigable streams and its attempt, upon the pretext that the interests of interstate commerce are affected, to bar persons from developing water power in and upon such streams without first procuring licenses so to do from said Commission and against the imposing of conditions in said licenses. All of such assumed jurisdiction and powers are in conflict with the reserved powers of the states that are specifically protected by Amendments 9 and 10 to the Federal Constitution. We think the assumption of such jurisdiction and powers by the Federal Congress and its Commissions have been encouraged (a) by an influence that seeks to abolish all the rights of the states, and (b) failure of the states to resist the usurpation by Federal Bureaus and Commissions of the reserved rights of the states. Such failure of the individual states, to resist the encroachment upon their powers, has resulted in the bench and bar losing sight of the fundamental principles upon which our Federal Constitution rests and has encouraged a torturing from clause three, section eight, of Article one of the Federal Constitution, a construction that was not intended by the 1787 Convention which promulgated that instrument or the conventions of the different states that ratified it.

THE CONTENTION OF KENTUCKY

(a) Strained Construction of Commerce Clause Includes Objectives Undreamed of by Constitutional Fathers.

The State of Kentucky contends that the Commerce Clause of the Constitution already has been strained and stretched to such an extent as to make it cover numerous matters not contemplated by its framers and which, had they been expressly included, would have been insurmountable barriers to its ratification by the States; also that the further stretching here being attempted by the Government, in its endeavor to make that clause the vehicle for giving it jurisdiction over water power projects on non-navigable streams, is even more unreasonable and involves distorting beyond recognition both the language and the intent of the Commerce Clause.

(b) Those Strained Constructions Are Not Reflected in Early Decisions of the Courts and Contemporary Early History of the Nation.

Contemporary history and the early decisions of this Court make it clear that, at the time of the adoption of the Constitution, there was little or no thought that, under its power to regulate *commerce,* Congress would have power to regulate *transportation* (whether on water or on land), as distinguished from the regulation of, or removal of barriers to, the doing of business; and definitely there was no thought that Congress would have the power to construct or provide *means of transportation.* In fact, Mr. Justice Daniel in the case of *Veazie et al.* v. *Moor,* 55 U. S. (14 How.) 568, 574, 14 L. Ed. 545, 548, in speaking for the Supreme Court of the United States, and in discussing the Commerce Clause, said:

> "*The design and object of that power, as evinced* in the history of the Constitution, *was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious dis-*

tinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain." (Emphasis ours)

As is well pointed out in the brief (page 8) submitted herein on behalf of the States of North Carolina et al., *amici curiae,* it was not until 1824, in *Gibbons* v. *Ogden,* 9 Wheat. 1,—6 L. Ed. 23—that this Court first held to the effect that the power of Congress to regulate commerce includes the power to regulate transportation by water; That at the time of the adoption of the Constitution, and in particular the Commerce Clause, it was not assumed that the Federal power under that clause reached out to include navigation, or at least did not reach out to include Federal authority with respect to interstate transportation on streams admittedly navigable in intrastate commerce, is shown by the terms of the so-called Virginia compact, whereby the Legislature of Virginia consented that the district of Kentucky, lying within the boundaries of Virginia, should be admitted as a state of the Federal Union.

Section 11 of the relevant Acts of the Legislature of Virginia prescribes as follows:

> ". . . that the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth, and of the proposed State, on the river as aforesaid, shall be concurrent only with the States which may possess the opposite shores of the said river." Kentucky Statutes Carroll's 1903 Edition, page 44.

This Act was adopted December 18, 1789, and when it was received by the Federal Congress the latter passed an Act admitting Kentucky as a State on February 4, 1791, which

Act became effective June 1, 1792. The Constitution of the United States had been promulgated September 17, 1787, and had been ratified by the Commonwealth of Virginia June 6, 1788. Thus, the Virginia compact was adopted in less than seven months after that State had ratified the Constitution of the United States. Every provision of the Constitution, and especially the Commerce Clause, had been discussed in every county of Virginia. No one can read Section 11 of the compact without reaching the conclusion that Virginia did not consider it wise to agree to Kentucky's becoming a sovereign State until she had secured an agreement binding on Kentucky that the navigation of the Ohio River, lying within northern boundary of Kentucky, should be free to the citizens of Virginia and to all the citizens of the United States. Surely Virginia would not have considered such an agreement necessary if it had been understood at that time that the Federal Government under the Commerce Clause was entrusted with the control, regulation, and protection of all of the navigation of the Ohio River.

(c) Justice Marshall Recognized in the Reserved Rights of the States Limitations Antagonistic to Modern Strained Construction of the Commerce Clause.

Chief Justice Marshall, the ablest contender for increased powers by the Federal Government that ever was a member of the Supreme Court, in *Gibbons* v. *Ogden*, supra, 195, on page 70 of the Law Edition, stated in terms consistent with the foregoing the intent and purpose of the Commerce Clause and gave an illustration which, so we think, indicated what in his view was the furthest limit of the powers of Congress embraced in the commerce clause, when he said:

"The completely internal commerce of a state, then, may be considered as reserved for the state itself.

"But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. *The deep streams which penetrate our country in every direction, pass through the interior of almost every state in the Union, and furnish the means of exercising this right.* If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, *if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.*" (Emphasis ours)

and further on in the opinion (203, on page 72 of the Law Edition) he said:

"*The objects of inspection laws is to improve the quality of articles produced by the labor of the country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose.* They form a portion of that immense mass of legislation *which embraces everything within the territory of a state not surrendered to the general government;* all which can be most advantageously exercised by the states themselves. *Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, &c., are components parts of this mass.*

"*No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation.*" (Emphasis ours)

To be sure, later in *Gilman* v. *Philadelphia*, 10 U. S. (3 Wall.) 713, 18 L. Ed. 96, it was held by this Court that under the commerce clause Congress has the power to protect the waters over which interstate navigation takes place. But certainly Chief Justice Marshall, who was never known to yield a power granted to the Federal Government or to cast a shadow upon its legal right to exercise any power granted, did not contend that under the Commerce Clause there was granted to the Federal Government any power to itself provide methods of transportation, e.g., to purchase lands for or to construct turnpike roads or canals. Justice Marshall, of course, knew the history of the convention that promulgated our Constitution and of the conventions of the different states that ratified that instrument. He was raised on an adjoining plantation to that of General George Washington, and he and his father, Thomas Marshall, were members of the Convention of Virginia called to ratify or reject that Constitution, and as an active member of that convention was a valuable aid to the Honorable James Madison who led the delegates who favored and secured its ratification. But the fact that he was an ardent federalist and a fervent nationalist did not deter him from frankly and clearly stating the limitations on the commerce clause embraced in the reserved rights of the states. It is refreshing to read in this opinion (*Gibbons* v. *Ogden*, one of our legal classics) the concession that the states retained and could exercise powers for "regulating the internal commerce," such as "those laws which respect turnpike-roads, ferries &c. . . ." (*supra*, 203 L. Ed. 72).

He did not strain the Commerce Clause even in the matters of navigation. He only gave the Federal Congress power to regulate transportation on "deep streams" "if a foreign voyage may commence or terminate within a state."

One cannot read Section 8 of Article I of the Federal Constitution without realizing the difference between the viewpoint and conclusions of the great Chief Justice and

the contentions made by the Government in the present case.

It is clear that the Federal power, to regulate interstate commerce, is implemented in the Constitution with all authority necessary to enable Congress to accomplish that purpose, but it is equally clear from both the language of the Constitution and also contemporary history that it was intended to exclude any power even to purchase of lands for constructing or providing means of transportation, such as turnpikes or canals, let alone any power actually to construct such roads or canals. To be sure, these powers, both as regards acquisition of the requisite lands and the construction of roads or canals by the Federal Government, appear in later years to have been sanctioned in practice and in the decisions of this Court. However, the point we wish to make here is that such sanctioning is despite, and not because of, the original intention as to the scope of the commerce clause, and that because of this fact it is in our view appropriate to pause carefully before sanctioning further claimed extensions of Federal authority under the commerce clause.

(d) Madison's Papers Demonstrate the Correctness of Marshall's Contention that Reserved Rights of the States Impose a Limitation on the Commerce Clause.

To illustrate what we say concerning the original intention, that there should be no Federal right to construct turnpikes or canals, let us note that clause 17, Section 8, Article I, of the Constitution reads:

> "To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places *purchased by the consent of the legis-*

lature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;" (Emphasis ours)

It is impressive that power to purchase land "by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings" is expressly included but that there is no similar inclusion of power to purchase land for turnpike-roads or canals.

An illuminating bit of history in this connection is found in Volume III, page 1576, of "The Papers of James Madison", by Henry D. Gilpin, published at Mobile by Allston Mygatt in 1842, (See House Doc. 398, 69th Congress, 1st Session, pp. 724-5), where it is stated that the following proceedings occurred on Friday, September 14, 1787, in the Federal Constitutional Convention:

"DOCTOR FRANKLIN moved to add, after the words, 'postroads,' Article 1, Sect. 8, a power '*to* provide for cutting canals where deemed necessary.'

"MR. WILSON seconded the motion.

"MR. SHERMAN objected. *The expense* in such cases will fall *on the United States,* and *the benefit accrue to the places where the canals may be cut.*

"MR. WILSON. Instead of being an expense to the United States, *they may be made a source of revenue.*

"MR. MADISON suggested an enlargement of the motion, into a power *'to grant charters of incorporation where the interest of the United States might require,* and *the legislative provisions of individual states may be incompetent.* His primary object was, however, *to secure an easy communication between the States, which the free intercourse now to be opened seemed to call for. The political obstacles being removed, a removal of the natural ones as far as possible ought to follow.*

"MR. RANDOLPH seconded the proposition.

"MR. KING thought the power unnecessary.

"MR. WILSON. *It is necessary to prevent a State from obstructing the general welfare.*

"MR. KING. The States will be prejudiced and divided into parties by it. In Philadelphia and New York, it will be referred to the establishment of a bank, which has been a subject of contention in those cities. In other places it will be referred to mercantile monopolies.

"MR. WILSON mentioned *the importance of facilitating by canals the communication with the Western settlements.* As to banks, he did not think with Mr. King, that the power in that point of view would excite the prejudices and parties apprehended. *As to mercantile monopolies, they are already included in the power to regulate trade.*

"COLONEL MASON *was for limiting the power to the single case of canals.* He was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution, as supposed by Mr. Wilson.

"*The motion being so modified as to admit a distinct question specifying and limited to the case of canals.*

"Pennsylvania, Virginia, Georgia, aye,—3; New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, North Carolina, South Carolina, no,—8.

"*The other part fell of course, as including the power rejected.*"

(Emphasis ours)

The Honorable James Madison being an ardent Nationalist recognized that in the adoption of the Commerce Clause "the political obstacles being removed, a removal of the natural ones as far as possible was in order." It was his opinion and evidently the opinion of the conven-

tion, because no one challenged his statement, that in adopting the Commerce Clause the convention had only removed the political obstruction that barred the free flow of commerce between the several States and between each of them and foreign nations and Indian tribes. No steam railroad existed in the world at that time. They were an undreamed-of possibility. Madison regarded waterways as the main arteries of commerce. He was endeavoring to remove physical obstructions to commerce in the same way that they had removed political obstructions by increasing the powers of Congress. *But the convention was not of his mind.* Its members were willing to remove political obstructions to commerce but by *an overwhelming majority refused to give the Federal Government the power to construct canals and thus remove physical barriers.* (Of course, the refusal to grant the power to construct canals generally includes the refusal to permit Congress to "canalize" non-navigable streams.)

(e) Madison's Veto of March 3, 1817, Was an Emphatic Recognition of the Absence of Federal Legislative Jurisdiction of Canals, Turnpike Roads, and Internal Improvements of State Waterways.

When we review the repeated rejection by the Constitutional Convention of a grant of power to Congress to construct roads and canals, a sample of which we have above quoted from "Madison's Papers," we begin to understand the last official act of this great President: A bill was presented to him entitled—"An Act to set apart and pledge certain funds for internal improvement," which bill specifically provided "for constructing roads and canals and improving the navigation of water courses in order to facilitate, promote and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense." Madison, as a member of the Constitutional Convention, had repeatedly advocated the grant

ing to Congress of the power to do each and every thing this bill undertook to accomplish. More than any other member of the convention he set forth reasons why these powers should be granted.

But he could not forget that in each instance his plea had been denied. He was in favor of the democratic principle of permitting the majority to rule. He did not believe in that fine art generally described as "writing around the Constitution." Hence on March 3, 1817, as his last official act he vetoed this bill and in doing so, wrote:

> "*'The power to regulate commerce among the several States' can not include a power to construct roads and canals, and to improve the navigation of water courses in order to facilitate, promote, and secure such a commerce without a latitude of construction departing from the ordinary import of the terms strengthened by the known inconveniences which doubtless led to the grant of this remedial power to Congress.*
>
> "To refer the power in question to the clause 'to provide for the common defense and general welfare' would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms 'common defense and general welfare' embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and laws of the several States in all cases not specifically exempted to be superseded by laws of Congress, it being expressly declared 'that the Constitution of the United States and laws made in pursuance thereof shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the Constitution

or laws of any State to the contrary notwithstanding.' *Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.*"

Messages and Papers of the Presidents, Volume 1, page 584—by James D. Richardson.

From further reading of this message one will observe that President Madison was still of the opinion that power should be given Congress to make the improvements provided in the bill. However, consistent with his strong conviction that what he considered to be a worthy object should not be accomplished by stretching of the commerce clause, he closed his veto message with a suggestion that those powers should be granted by *Constitutional Amendment.*

(f) President Monroe Supported Madison's Construction in a Veto Message and State Paper.

By examining Volume II, page 142, of Messages and Papers of the Presidents, one will discover that President James Monroe vetoed a bill similar to the one above set forth. He too was of the opinion that Congress should be granted the power to enact such legislation and wrote a state paper (Vol. II, page 144) *advocating such an amendment to the Constitution.* While President Monroe was not a member of the Constitutional Convention at Philadelphia, it should be remembered that he was a member of the session of Congress, under the Articles of Confederation, that sat at the city of New York at the same time the Constitutional Convention was in session and during the time was in constant correspondence with Mr. Madison concerning the provisions embodied in the Constitution.

(g) Even Alexander Hamilton Agreed to Madison's Construction as to Canals.

Even Alexander Hamilton had a like point of view. No delegate that attended the Constitutional Convention labored more earnestly to create a strong national government for the United States than did he. There was a great difference between him and James Madison: Hamilton had no faith in the vox populi—he even had a contempt for majorities when they opposed the objectives he sought to accomplish. Madison was equally anxious to establish a strong national government, but had a profound respect for the rule of the majority; he would present every argument within his power to secure the granting of what he believed to be a necessary power, but when a majority of the convention rejected his argument and withheld from the Federal Government the power he wished to grant, he respected and stood by the decision of the majority. Hamilton was the most artful and successful liberal constructionist of the Federal Constitution of his day and age, and his constructon always enlarged the powers granted and often added powers withheld. However, in his famous opinion as to the constitutionality of the Bank of the United States of date February 23, 1791, he admitted that there is:

> "*. . . nothing in any part of the Constitution respecting the regulation of canals.*"
>
> Works of Alexander Hamilton, Volume 3, page 196, by Henry Cabot Lodge.

Of course Hamilton and Madison actually *knew* the intent and purposes of the Constitutional Convention.

(h) Federal Control of Power Dams in Navigable Streams Is Permissible Primarily to Protect Navigation, and Secondarily to Dispose of Surplus Power Necessarily Developed.

We trust that in the foregoing we have made clear that whatever may be the present status in practice or in

law, the intention of those who wrote the commerce clause into the Constitution and of the early interpreters of that clause was that the Federal Government should have no right to provide or construct transportation facilities such as turnpikes or canals. And, of course, they had not the remotest intention of granting to the Federal Government directly or by implication any authority to construct dams, or to regulate the dams of the States or their citizens, on non-navigable streams. We submit that there was no such conception even as regards navigable streams. We, of course, today do not contend that the Federal Government has no control over dams on navigable streams, but recognize that under the holdings of this Court dams in navigable streams may be regulated for the protection of navigation, and to that end may even be absolutely prohibited (*Union Bridge Co.* v. *United States*, 204 U.S. 364, 51 L. Ed. 523; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 57 L. Ed. 1063).

(i) Federal License to Create Obstructions Even in Navigable Streams Can Impose Conditions Only that Affect Navigability.

However, we disagree with the Government's contention as to the powers which it claims accrue to it by reason of its right to prohibit obstructions to navigable streams. It is our view that the federal right to prohibit an obstruction to a navigable stream does not carry with it the right to permit the obstruction on such conditions (unrelated to the protection of navigation—as is true of many of the license conditions required by the Power Commission) as the Federal Government may choose to impose (*Frost Trucking Co.* v. *R. R. Commission*, 271 U.S. 583, 593, 70 L. Ed. 1101, 1104). Instead, it is our view that the only conditions that the Federal Government may lawfully impose, in the case of a structure erected in a navigable stream, are those which relate to the protection

of navigation. (*Port of Seattle* v. *Oregon & Washington R.R. Co.*, 255 U.S. 56, 63, 65 L. Ed. 500, 506; *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 419, 70 L. Ed. 339, 346.)

As regards regulation of dams on non-navigable streams, it is clear that the right of the Federal Government is limited to restraining acts on the non-navigable streams which substantially interfere with navigation on waters navigable in interstate commerce. (*United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 709, 43 L. Ed. 1136, 1143.)

In the present case, however, the Government is asking this Court to stretch the Commerce Clause beyond established limits, whether for non-navigable or navigable streams. We submit that such a process of stretching the Commerce Clause further and further beyond the intention at the time the Constitution was written and adopted can lead only to nullification of the States' rights which were so clearly reserved. And in our view, respectfully submitted, *the time to stop* such further attempts to stretch *is now.*

We are not opposed to progress. We are in hearty agreement with the opinion of this Court in the case of *United States* v. *Chandler-Dunbar Co., supra,* holding that, where a river is navigable in fact and where it is necessary to construct a dam therein to maintain or improve that existing navigability, it has a perfect right to sell the surplus power or energy. But we are opposed to the Federal Government, or any of its Commissions, directly or indirectly, through a license system or otherwise, confiscating the rights and property owned by the several states, or their riparian owners, on either navigable or non-navigable streams within the states.

(j) Excerpts from Speech of Senator Black in the Congressional Record in Protest Against further Encroachment on "the Rapidly Disappearing Rights of the Sovereign States of America."

In the preparation of this brief we have reviewed much that is contained on the subject in the Congressional Record but have found nothing which impresses us as being more apt on the subject than an address delivered by Senator Black of Alabama. Said address, which can be found on pages 4536–4538 of Part 4, Volume 69, Congressional Record of 70th Congress, 1st Session, could be read with much interest in connection with our brief, but the following excerpt on page 4537 of the Record so accurately represents the attitude of Kentucky that we take the liberty of quoting it with emphasis as follows:

> "The basic proposition is that since the days of the early settlement of this country, when a man went to the banks of a running stream *and established a little mill run by water power that power was his.* He could not be disturbed by judicial or legislative decree to extend that power over certain territory where commerce did not naturally carry it. The waters of the Tennessee at Muscle Shoals is a part of the interior of the State of Alabama, as the waters of any stream which flows through any of the Western States is a part of one of those states. When an attempt is made to take the power which flows through any stream, *when the Government never has had any right to manufacture power, a right which is subservient to the State under the Supreme Court opinion, and say, 'We will distribute it to the various States by legislative mandate,' we are doing exactly what the Senator from Mississippi (Mr. Harrison) said he did not believe in. We are invading the rights of the State and making of it a conquered province, the like of which has not been seen since the days of slavery in the provinces that were under the subjection of the Roman yoke.*

What is the State? Has it no right at all? *It can not get any taxes under this plan. Somebody has to pay the taxes. Where should the taxes come from? If they do not come from industry, where will they come from?* They will have to come from the poor, hard-working, overburdened farmer. Yet we are told that any person or corporation or government that is big enough may come into the State of Alabama and put its hands on what is justly ours and take from us the right to collect taxes and rob the State of Alabama of the last right *which has been left it under the rapidly disappearing rights of the sovereign States of America.*" (Emphasis ours)

We believe that this Court will preserve to the states their reserved rights, and, believing this, we file this brief as amicus curiae.

Respectfully submitted,

COMMONWEALTH OF KENTUCKY

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